No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JAN. 10, 2018
CERTIORARI GRANTED APRIL 30, 2018

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK VARELA, on behalf of himself and all others similarly situated,

Plaintiff,

v.

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Defendants.

No. 5:16-cv-577-DMG-KS

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	3/29/2016	Complaint
34	5/31/2016	Defendants' Motion to Compel Arbitration or to Dismiss
37	6/10/2016	Plaintiff's Opposition to Defendants' Motion to Compel Arbitration or to Dismiss
38	6/17/2016	Defendants' Reply in Support of Motion to Compel Arbitration or to Dismiss
40	7/7/2016	Minutes of In Chambers Order on Motion to Compel Arbitration or to Dismiss

NO.	DATE	DESCRIPTION
41	7/29/2016	Defendants' Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

LAMPS PLUS, INC.; LAMPS PLUS CENTENNIAL, INC.; LAMPS PLUS HOLDINGS, INC.; DOES, 1 through 10, inclusive,

Defendants-Appellants.

No. 16-56085

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
17	3/10/2017	Appellants' Opening Brief
18	3/10/2017	Excerpts of Record
24	4/10/2017	Appellee's Answering Brief
27	4/24/2017	Appellants' Reply Brief
37	8/3/2017	Opinion
40	9/11/2017	Order Denying Rehearing

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
EASTERN DIVISION

FRANK VARELA, on behalf of
himself and all other similarly situated,
Plaintiff,
v.
LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC., and DOES 1 through 10, inclusive,
Defendants.

Case No: 5:16-cv-00577
Hon. Dolly M. Gee
Complaint Filed: March 29, 2016

DECLARATION OF MICHELE M. VERCOSKI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS, IN THE ALTERNATIVE, A RULE 12(B)(6) MOTION TO DISMISS

Filed concurrently with Plaintiff's Opposition;
Declaration of Frank Varela

DECLARATION OF MICHELE M. VERCOSKI

I, Michele M. Vercoski, hereby declare as follows:

1. I am an attorney licensed to practice law before all courts of the State of California in the above-captioned action. I am a partner at the law firm McCuneWright, LLP, one of the counsels of record for Plaintiff Frank Varela. The following facts are

within my personal knowledge or based on records and files at my law firm, and, if called upon as a witness, I could and would testify competently thereto.

2. Attached hereto as Exhibit 1, is a true and correct copy of the JAMS Employment Arbitration Rules & Procedures, which I downloaded from JAMS' website on June 9, 2016 from http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf.

3. In its motion, Lamps Plus submits that this Court should order that a JAMS arbitrator be used to arbitrate Plaintiff's claims. In doing so, Lamps Plus draws the Court's attention to Attachment A, which provides that "arbitration will be conducted by the Judicial Arbitration & Mediation Service, Inc. ('J.A.M.S.')." Beeson Decl., ¶ 7, Ex. 1. However, they acknowledged that the arbitration provision allows for the party initiating arbitration can demand arbitration with either JAMS or AAA. As such, Lamps Plus deems itself the part initiating arbitration and as such, elect to use JAMS in the potential arbitration of Plaintiff's claims.

4. In both its motion and the arbitration provision, Lamps Plus claims that it would "pay all fees associated with the arbitration that are unique to arbitration including the costs of the arbitrator." Mot., 6:26-7:1; Beeson Decl., ¶ 7, Ex. 1. However, the Lamps Plus Employment Arbitration Rules and Procedures provide that "the arbitration shall be in accordance with the then-current J.A.M.S. Employment Arbitration Rules." Beeson Decl., Ex. 1, ¶ 2. Yet, the current J.A.M.S. Employment Arbitration Rules provide that if an arbitration is based on an agreement "that is required as a condition of employment, the only fee that an employee may be re-

quired to pay is the initial JAMS Case Management Fee." Ex. 1 JAMS Employment Arbitration Rules & Procedures, Rule 31(c). Rule 31(c) goes on to state, "JAMS does not preclude an employee from contributing to administrative and Arbitrator fees and expenses." *Id.* In fact, in the section titled "Administrative Fees," the JAMS rules provide that for employment matters involving three or more parties, such as this case, the Filing Fee is $2,000. A Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation." *Id.* As such, there exists a conflict between the arbitration provision, the Lamps Plus Employment Arbitration Rules and Procedures and Lamps Plus motion as to the fees and expenses Plaintiff could be required to pay. Indeed, given this conflict, it is quite possible that Lamps Plus could argue in arbitration that such fees and expenses be allocated to Plaintiff.

5. Moreover, the nature of this case involves highly technical facts pertaining to firewalls and storage of employee data. As such, due to the complexity of the facts in this case involving cyber security, it is necessary that Plaintiff get access to Lamps Plus's computer system, and have an expert work with attorneys to establish how the unknown criminal was able to co-opt Lamps Plus's email system so as to pose as an employee. The cost of such an expert could alone costs thousands of dollars, of which Plaintiff would be unable to afford on his own.

6. Additionally, Plaintiff's right to discovery under the Lamps Plus Employment Arbitration Rules and Procedures is extremely limited. These rules provide that each party has the right to depose one

witness as well as any expert designated by the parties. Beeson Decl., Ex. 1. However, Plaintiff is likely to require testimony from multiple witnesses within Lamps Plus's corporate structure, including, personnel from its information technology and human resources departments. Further, these rules preclude Plaintiff from utilizing other powerful discovery tools, such as interrogatories, requests for admission and inspections. If Plaintiff is required to arbitrate his claims, he would be prohibited from inspecting Lamps Plus's computer system. Additionally, any and all documents pertinent to Plaintiff's claims are sensitive and exclusively in Lamps Plus's control and without proper judicial oversight could easily be concealed from Plaintiff. Thus, given the limited extent of discovery permitted by these rules, Plaintiff would be severely limited in the information he would have available to him in arbitrating his claims.

7. Furthermore, while Plaintiff's counsel is able to handle a putative class action in court on a contingency basis at no cost to Plaintiff, as a result of attorney fee provisions in the agreements, the common fund doctrine, and statutory provisions, it is likely that no attorney would be willing to handle Plaintiff's individual arbitration claims due to the relatively small amount of damages at stake, which are likely far exceeded by the necessary fees and expenses required to arbitrate such claims. Accordingly, it is my opinion that it would be cost prohibitive for Plaintiff to pursue an individual arbitration of his claims.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal and firsthand

knowledge of the facts and, if called upon as a witness, I could and would competently testify thereto.

Executed on this 10th day of June 2016, in Redlands, California.

Dated: June 10, 2016

By: [Manuscript signature]
Michele M. Vercoski
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
EASTERN DIVISION

FRANK VARELA, on behalf of himself and all other similarly situated,
Plaintiff;
v.
LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC., and DOES 1 through 10, inclusive,
Defendants.

Case No: 5:16-cv-00577

DECLARATION OF PLAINTIFF FRANK VARELA IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS, IN THE ALTERNATIVE, A RULE 12(B)(6) MOTION TO DISMISS

DECLARATION OF FRANK VARELA

I, Frank Varela, hereby declare as follows:

1. I am the named Plaintiff in the above-captioned action. The following facts are within my personal knowledge and, if I am called upon to testify in this action, I could and would testify competently thereto. As such, I make this Declaration in support of Plaintiff's Opposition to Defendant's Motion to Compel Arbitration on an Individual Basis and, in the Alternative, a Rule 12(b)(6) Motion to Dismiss.

2. I am an employee of Lamps Plus, and have been an employee for approximately nine (9) years as I was hired in 2007. I am currently employed as a Warehouseman at the Lamps Plus warehouse located in Redlands, California. In my capacity as a Warehouseman, I am responsible for assisting with store transfers, orders for shuttle, add-on for truck deliveries and other miscellaneous duties. My highest level of education is a high school diploma.

3. In March of 2016, I learned that a human resources employee released my W-2 income and tax withholding statement, along with those of every other employee who worked for Lamps Plus during 2015, to an unknown criminal. A few weeks after the data breach, I was informed by the IRS that there was a fraudulent income tax filing under my name. Because of my concern over the loss of my personal information and the subsequent fraudulent filing of my tax returns with my personal information stolen in the data breach, I sought legal help. This is how I have come into contact with my counsel in this matter, and my counsel worked with me to file a complaint in this matter regarding the data breach as a potential class action.

4. I have recently been informed that Lamps Plus is seeking to force me to bring my claims through an arbitration proceeding, instead of in court, and to force me to bring these claims on an individual basis instead of a class action.

5. I have reviewed the Arbitration Agreement that was attached to the declaration of Lucenda Jo Beeson that contained my signature. As stated below, I have no recollection of seeing this arbitration provision and agreeing to the terms of the agreement.

6. When I was hired on April 9, 2007, I was presented with a stack of documents to sign. I have no recollection of reading or agreeing to this arbitration provision as I was provided multiple documents at the same time. I was required to sign all such documents as a condition of my employment with Lamps Plus.

7. I do not recall anyone from Lamps Plus explaining the contents of this arbitration agreement to me.

8. While I do not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision, even I had been so advised, I could not afford to retain an attorney to review this arbitration provision.

9. When I signed the provision, I do not recall being informed that I have three days to revoke the agreement.

10. When I signed this arbitration provision, I did not understand that, in doing so, I would be waiving my right to a jury trial if I had any employment dispute with Lamps Plus.

11. Further, I did not understand that, in signing this arbitration provision, I would also be waiving my right to a jury trial in any legal dispute between myself and Lamps Plus. As such, I did not understand that this arbitration provision would be applied to disputes arising from a context outside of my employment responsibilities. Particularly, I did not understand that, in signing this arbitration provision, it would apply to a dispute arising from another Lamps Plus employee disclosing mine and my wife's confidential information to anyone outside of Lamps Plus.

12. In my experience, any agreements provided to me by Lamps Plus were drafted exclusively by Lamps Plus. I have never been given the opportunity to participate in negotiating the terms of any agreements I may have had with Lamps Plus. In fact, any agreements provided to me by Lamps Plus have all been presented on a take-it-or-leave-it basis. That is to say, my only choice was to accept all documents along with the job, or reject some or all of the documents and forgo with employment opportunity with Lamps Plus.

13. In fact, it is especially a surprise to me that an arbitration provision that Lamps Plus attempts to apply to all claims regarding my relationship with Lamps Plus, even those claims outside of the context of my employment, is one from almost one decade after I was hired. Lamps Plus drafted the standardized arbitration agreement and it was presented to me entirely as a take-it-or-leave-it basis, which like all documents and agreements Lamps Plus has presented to me, was non-negotiable by me. However, as I stated before, I do not recall ever being provided with this arbitration agreement or agreeing to it.

14. I also believe it is not fair that Lamps Plus is attempting to force me into arbitration of my claims regarding the data breach and theft of my personal information, when it has never needed to initiate an arbitration against me regarding my employment duties, because Lamps Plus could always simply terminate me or demote/suspend me. This means I will always be the one who has to initiate arbitration proceedings should a dispute arise.

15. At any rate, in reading this arbitration provision now, I would have understood it to apply only to employment claims as it is in conjunction with my

employment, and would not apply to my data breach claims, which have nothing to do with my employment agreement.

16. If I had been provided with an arbitration provision that Lamps Plus could use to prohibit me from bringing a claim in court for their release of my personal data to a third party criminal and bringing a class action for the same, I believe I would have taken note of it and would not have agreed to that.

17. Although Lamps Plus agrees to pay for the arbitrator, I am alarmed that I will have to pay the initial filing fee of $2,000 for initiating arbitration, because this is a matter involving three or more parties. Moreover, whether I prevail or not, I would have to cover my own attorney's fees, expert witness fees and other costs.

18. With respect to the latter, I believe that I could not pursue this claim by myself without an attorney representing me, as I cannot determine exactly how the data breach occurred or the extent of harm that me and my wife have been subject to as a result of our personal information being released directly to fraudsters. My wife and I have spent considerable time trying to safeguard our data and we pay to have it monitored professionally and we do it personally. We also know that our stolen data was used to file fraudulent tax returns. We must now continue to pay indefinitely for ongoing credit monitoring and will continue to personally monitor our accounts. However, I do not personally have enough information or expertise to determine on my own what legal claims I could bring and how to value my damages without the help of experts and attorneys.

19. However, I understand that the amount of work that my attorneys and any experts they may retain, would at a minimum, cost well into five-figures in dollars. I understand that because of the relatively small amount that I would be awarded in arbitration alone, it would be difficult to find any attorney to represent me on an entirely contingency fee basis because any recovery would potentially be smaller than fees and costs, which I am responsible for covering, according to the arbitration provision. Therefore, when considering the arbitration initiation fee and the attorney's fees, expert fees and related costs, it would be cost prohibitive for me to undertake an arbitration of just my individual claims.

I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct. Executed this 10th day of June, 2016, in Redlands, California.

Dated: June 10, 2016 Respectfully submitted,

By: [Manuscript signature]
Frank Varela
Plaintiff